No. 1102

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

ROBERT GOULD and DOWLING BROS. DISTILLING COMPANY, a Kentucky corporation,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review a judgment entered by the Circuit Court of Appeals for the Sixth Circuit on February 8, 1946, affirming the judgment and sentence imposed by the District Court of the United States for the Eastern District of Kentucky. Petitioners' petitions for rehearing were denied on March 11, 1946.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals, filed on February 8, 1946, is reported in 153 F. (2d) 353 and is printed in the record at pages 936-948.

BASIS OF JURISDICTION

Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C., Section 347(a).

The opinion of the Circuit Court of Appeals was filed February 8, 1946; petitions for rehearing were filed February 27, 1946, and a supplement thereto was filed on March 8, 1946; the several petitions for rehearing were denied on March 11, 1946. Application for stay of mandate pending application in this Court for writ of certiorari was made on March 15, 1946, and order staying the mandate pending the application for writ of certiorari in this Court was entered April 1, 1946.

QUESTIONS PRESENTED

Three questions are presented, which, petitioners contend, call for determination by this Court:

1. May separate sentences be imposed upon each of forty-eight counts in an indictment charging sales in violation of the Emergency Price Control Act, as amended, 56 Stat. 23, 28, 50 U. S. C., Section 904(a), War, Appendix, where the acts charged in a substantial number of such counts constitute no separate sales or transactions, but are parts of the identical sales or transactions charged in other counts of the same indictment?

2. May a Kentucky corporation be convicted and sentenced for the sale of its products at prices in excess of those fixed by the Office of Price Administration, where such sales were made by one of its two principal stockholders, who was a director of the corporation, and authorized to sell its products, but not an officer therein, where no other stockholder, director, officer, agent, employee or representative of the corporation had knowledge of the illegal transactions and where the corporation received no benefit therefrom?

3. May the District Court admit, in a criminal trial, evidence as to alleged unlawful acts of the defendant not charged in the indictment and for which the defendant had not been convicted or indicted?

SUMMARY STATEMENT

In January, 1945, petitioners, one a resident of Ohio and the other a Kentucky corporation, were indicted on forty-eight counts charging violation of Section 4(a) of the Emergency Price Control Act of 1942, as amended, 56 Stat. 23, 28, 50 U. S. C., War, Appendix, Section 904(a). The indictment charged sales of distilled spirits at prices in excess of the ceilings fixed by the Office of Price Administration. It was charged that the allegedly unlawful sales were made to two persons over a period of time between June 26, 1943, and December 31, 1943 (R. 2-137).

The indictment disclosed on its face that a substantial number of the forty-eight separate counts was based upon alleged transactions which were, in fact, installments or fragments of identical transactions charged in other counts of the same indictment.

For example, Counts 1 and 2 (R. 2-7), taken together, charge that on June 16, 1943, petitioner Robert Gould agreed to sell one Josselson seven hundred twenty-four cases of whiskey and two hundred cases of rum, invoiced on June 26, 1943 and paid by a single check (R. 207). Thus, the two counts disclose a single sale, initiated in the same interview, invoiced on the same date and paid for by one check. Yet the indictment separated the sale into two counts, one covering whiskey and the other rum.

Counts 1 and 2 merely illustrate what was characteristic of the entire indictment,[1] but they are of special importance

[1] Counts 3, 4, 5 and 6 (R. 7-18), relate to a single sale allegedly agreed to by Gould on July 7, 1943, but covered by four invoices. The same situation characterizes Counts 7 and 9 (R. 18-21, 23-26), Counts 10, 11, 12 and 13 (R. 26-37), Counts 14, 15, 16 and 17 (R. 37-48), Counts 19, 20 and 21 (R. 51-59).

because two consecutive maximum one year sentences were imposed on the basis of these counts.

During the period covered by the indictment, the petitioner, Dowling Bros. Distilling Company, was a Kentucky corporation (R. 372), with its principal office and place of business in Kentucky (R. 651). Petitioner, Robert Gould, owned slightly more than fifty per cent of its stock. Petitioner's brother was the only other substantial stockholder (R. 372-373), but, during the period covered by the indictment, petitioner's brother was serving in the United States Coast Guard (R. 750-751). He was not named in the indictment, nor does the record contain any proof that he participated in any of the acts charged against the corporation.

Petitioner, Robert Gould, was a director, but not an officer, of the petitioner, Dowling Bros. Distilling Company (R. 650). He did, however, make all the sales for the corporation which are charged in the indictment, and controlled most of its sales (R. 352-354, 651). Petitioner, Robert Gould, was also engaged in the whiskey brokerage business (R. 652) and was interested in several other distilleries (R. 652-658). His office and residence were located in Cincinnati, Ohio (R. 567, 649).

In each count of the indictment, it is charged that Robert Gould agreed in Cincinnati to sell certain liquors at unlawful prices; that Dowling Bros. Distilling Company invoiced and shipped such liquor from Burgin, Kentucky, and received payment therefor at lawful prices; and that thereafter purchaser, in accordance with such agreement, paid additional sums over and above the ceiling prices, to "Robert Gould and the Dowling Bros. Distilling Company by means of payment to Robert Gould" in Cincinnati, Ohio (R. 2-128). In each of these counts, the petitioner, Robert Gould, is described as "a principal stockholder and

director of the said Dowling Bros. Distilling Company'' (R. 2-128).

The record contains no evidence that any officer, employee, agent or other representative of Dowling Bros. Distilling Company, except Robert Gould, knew of the alleged agreements to sell whiskey at unlawful prices. Likewise, there is no evidence that the corporation received for its whiskey any sums in excess of lawful selling prices.

During the trial, testimony was introduced by the prosecution relating to alleged illegal transactions not charged in the indictment and for which neither of the petitioners had ever been indicted or convicted (R. 867-889, 892-894, 894-896). This testimony was admitted by the trial court on the mistaken assumption that the petitioner, Robert Gould, had testified during cross-examination that he had never at any time sold any whiskey at over-ceiling prices. The petitioner did not make such a wide statement (R. 685) and the trial judge admitted this assumption to be erroneous (R. 884). Nevertheless, the testimony thus erroneously admitted was allowed to stand as rebuttal over vigorous objection of petitioners' counsel (R. 867-896).

After the jury found both petitioners guilty on all the counts of the indictment, the District Court sentenced petitioner, Robert Gould, to fines totaling $240,000 ($5,000 for each count), and to serve six consecutive one-year terms (in addition to 42 concurrent one-year sentences). The corporation was fined $240,000 ($5,000 for each count) (R. 925).

REASONS FOR GRANTING THE PETITION

The issues presented in this case do not involve mere ordinary errors on the part of the trial court and the Circuit Court of Appeals. They raise basic questions of general concern and fundamental importance.

1. The Circuit Court of Appeals for the Sixth Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court.

Petitioners contend that, in the instant case, the indictment on its face shows that a substantial number of the forty-eight counts are predicated upon sales or transactions which are mere installments or fragments of the same sales or transactions charged in other counts of the same indictment. For illustration, petitioners have described the relation between Counts 1 and 2 of the indictment on pages 3-4 of the Summary Statement above. If those responsible for the enforcement of the Emergency Price Control Act can, by fragmentizing what is essentially a single transaction, create double or triple punishment for a single offense, penalties will be imposed far in excess of those contemplated by the statute. *In re Snow*, 120 U. S. 274.

Situations similar to this will constantly arise in the enforcement of wartime price control legislation, and it is important that this issue be clarified, so that the enforcement of the Emergency Price Control Act may be free from caprice and uncertainty. The situation presented by this indictment is in no sense peculiar to a single case. The indictments which were returned in this case could be returned in any case involving a charge of substantial violations of the Emergency Price Control Act.

The uncertainties and the possibilities of injustice opened by the instant case are real, and the jurisdiction of this Court is properly invoked to set them at rest.

2. The Circuit Court of Appeals has sanctioned conduct upon the part of the District Court which so far departs from the accepted course of judicial proceedings as to call for the exercise of this Court's power of supervision on behalf, not only of these petitioners, but of all persons accused of crimes in the Federal Court.

This departure was twofold:

(a) The petitioner, Dowling Bros. Distilling Company, was convicted for the alleged criminal acts of Robert Gould, in the complete absence of proof that the corporation benefited by his acts and in the complete absence of proof that any representative of the corporation other than Robert Gould had knowledge of his allegedly unlawful conduct.

(b) Equally alien to proper standards of judicial procedure was the admission of highly prejudicial testimony relating to unlawful acts not charged in the indictment and for which petitioners had never been indicted or convicted. This improper testimony, admitted over timely objection and exception, may well have led to petitioners' conviction on the basis of testimony relating to extraneous matters rather than upon evidence relating to the acts upon which they were indicted. Aside from this prejudicial and inadmissible evidence, the only testimony against petitioners was that of persons admittedly participating in the allegedly illegal acts. Such action upon the part of the trial court flies in the face of overwhelming judicial authority, and constitutes flagrant and reversible error. *Boyd* v. *United States*, 142 U. S. 450, 12 Sup. Ct. 292, 37 L. Ed. 1077.

3. By sanctioning the admission of evidence relating to offenses not charged in the indictment, the Circuit Court of Appeals decided a federal question in conflict with applicable decisions of this Court.

Boyd v. *United States, supra*, holds that the admission of testimony relating to offenses not charged in the indictment constitutes reversible error. The testimony admitted in this case did not come within any recognized exception to the rule of the *Boyd* case, and, therefore, conflicted with it.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of

the Circuit Court of Appeals for the Sixth Circuit should be granted.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINIONS BELOW

The opinions below have been referred to in the petition for writ of certiorari under this same caption.

JURISDICTION

The statement as to jurisdiction has been set forth in the petition.

STATEMENT OF THE CASE

The facts have been stated in the Summary Statement contained in the petition.

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in holding that the defendants could be lawfully convicted and sentenced on each of forty-eight counts of an indictment which showed on its face that the sales or transactions charged in several of the counts were mere fragments of identical acts charged in other counts of the same indictment.

2. The Circuit Court of Appeals erred in holding that Dowling Bros. Distilling Company was liable for the criminal acts of Robert Gould in the absence of any proof that the corporation received benefit from such acts, and in the absence of proof that any other member or representative of the corporation possessed knowledge of Gould's alleged transactions.[2]

3. The Circuit Court of Appeals erred in affirming the District Court's admission of testimony as to other unlaw-

[2] In this respect, the error of the Circuit Court of Appeals was twofold. The District Court overruled Dowling Bros. Distilling Company's demurrer to the indictment. The District Court also instructed the jury in effect that Dowling Bros. Distilling Company should be held criminally liable for the unlawful acts of Gould, a major stockholder and director, and the manager of its sales. This instruction was given over the objection of petitioners' counsel. Both errors were specified in the appeal and hence both were sanctioned by the Circuit Court of Appeals.

ful acts of the petitioner, Gould, such acts not being charged in the indictment and Gould never having been indicted or convicted for them.

4. The Circuit Court of Appeals erred in affirming the judgment and sentences of the District Court for the Eastern District of Kentucky.

ARGUMENT

I. Defendants Cannot Lawfully Be Convicted on Multiple Counts of an Indictment Which Cover Identical Transactions.

The defendants were convicted and given maximum sentences on all forty-eight counts of an indictment charging violations of Section 4 (a) of the Emergency Price Control Act of 1942, as amended, (Section 904 [a], Title 50, U. S. C., War, Appendix) which provides in its pertinent parts:

> "It shall be unlawful . . . for any person to sell or deliver any commodity . . . in violation of any regulation or order under Section 2 (Section 902 of this Appendix) or of any price schedule effective in accordance with the provisions of Section 206 (Section 926 of this Appendix), or of any regulation, order or requirement under Section 202 (b) or Section 205 (f), [Sections 922 (b) or 925 (f) of this Appendix], or to offer, solicit, attempt or agree to do any of the foregoing."

The penalty section under which the defendants were sentenced is Section 925 (b), Title 50, U. S. C., (War, Appendix) which provides in part:

> "Any person who wilfully violates any provision of Section 4 of this Act (Section 904 of this Appendix) . . . shall, upon conviction thereof, be subject to a fine of not more than $5,000 or to imprisonment for not more than one year . . . or to both such fine and imprisonment."

Petitioners contend that the indictment in the instant case reveals on its face that a substantial number of its individual counts are based upon alleged sales or deliveries which are, in fact, but fragments of identical sales and deliveries charged in other counts. Artificial separation of single transactions into minute fragments, serves to multiply unlawfully the penalties imposed by Congress for violation of the Emergency Price Control Act.

Counts 1 and 2 of the indictment (R. 2-7), taken together, charge that on June 16, 1943, Robert Gould agreed to sell one Josselson seven hundred twenty-four cases of whiskey and two hundred cases of rum. This rum and the whiskey were invoiced on June 26, 1943 (thus indicating a single delivery), and paid for by a single check (R. 207). Thus, there was clearly a single, unitary transaction, based upon one agreement, and paid for by a single check. The statute in question prohibits the unlawful sale or delivery of a commodity. The only apparent basis for separating the transaction into two counts, was the fact that both whiskey and rum were involved in the transaction.

Likewise, Counts 3, 4, 5 and 6 (R. 7-18), taken together, charge that on July 7, 1943, petitioner, Robert Gould, agreed to sell Josselson, at unlawful prices, two thousand, four hundred twenty-four cases of whiskey, one thousand, ninety-six cases of brandy, and three hundred cases of rum. Here, again, was a single transaction artificially divided into four separate counts.

Counts 7 and 9 of the indictment (R. 18-21, 23-26), taken together, charge that on August 4, 1943, Robert Gould agreed to sell Josselson four hundred fifty cases of whiskey and four hundred sixty-two cases of brandy. Thus, a sale agreed to in a single transaction, was made the basis for two separate counts.

Counts 10, 11, 12 and 13 (R. 26-37), Counts 14, 15, 16 and 17 (R. 37-48), and Counts 19, 20, and 21 (R. 51-59), each

group taken together, indicate the unjustified and artificial fragmentization of what were essentially single transactions. The evidence, though not the actual language of the indictment itself, would point a similar conclusion in respect of Counts 30 and 31 (R. 386), Counts 32 and 33 (R. 387), Counts 36 and 37 (R. 388), Counts 38 and 39 (R. 389), and Counts 40 and 41 (R. 390).

The arbitrary and invalid character of this indictment is well illustrated by *In re Snow*, 120 U. S. 274. In that case, the defendant was accused of cohabiting with more than one woman, in violation of Federal law. The indictment contained three counts, one for the year 1883, one for 1884 and one for 1885. He was convicted on each count. The conviction was held void by this Court, which stated, 120 U. S. at 282:

> "The division of two years and eleven months is wholly arbitrary. On the same principle there might have been an indictment covering each of the thirty-five months, . . . , or even an indictment covering every week . . . ; and so on, *ad infinitum*, for smaller periods of time. . . . Here each indictment charged unlawful cohabitation with the same seven women; all the indictments were found at the same time, by the same grand jury, and on the testimony of the same witnesses, covering a continuous period of thirty-five months; and it was the mere will of the grand jury which divided the time among three indictments, and stopped short of dividing it among thirty-five, or one hundred and fifty-two, or even more."

The analysis thus used in the *Snow* case is equally applicable to the case at bar. In each of the groups of counts referred to, there was but a single transaction. These transactions were separated by the arbitrary will of the grand jury, which might equally have returned a separate count for each case of liquor, for each bottle or for each drink. The touchstone by which to determine where one

transaction ends and another begins was revealed in *Blockburger* v. *United States,* 284 U. S. 299, where this Court stated, at page 302:

> "Each of several successive sales constitutes a distinctive offense, however closely they may follow each other. The distinction stated by Mr. Wharton is that 'when the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.' Wharton's Criminal Law, 11 Ed., § 34."

When this test is applied to the case at bar, it becomes clear that, for example, Counts 1 and 2 of this indictment relate to a transaction which was the result of a single impulse. Therefore, it cannot be made the basis of more than a single count. See *Braverman* v. *United States,* 317 U. S. 49, 52-55.

The doctrine thus enunciated claims lineage from the decision of Lord Mansfield in *Crepps* v. *Durden,* 2 Cowper 640, where it was held that the indictment of a baker for unlawfully working upon the Lord's day, could not be separated into a multitude of offenses, each relating to a separate sale on the same day.

The point is also well illustrated in *Standard Oil Company of Indiana* v. *United States,* 164 Fed. 376 (C. C. A. 7), cert. den., 212 U. S. 579. In that case, the defendant was sentenced to pay the maximum fine on each of fourteen hundred sixty-two counts in an indictment charging violation of the Elkins Act, prohibiting discriminatory concessions in respect of rates for transportation in interstate commerce. Each count charged the shipment of a single car of oil. The Court of Appeals reversed the conviction, basing its decision upon the fact that there were but thirty-six transactions within the period charged in the indict-

ment and that these had been artificially separated into fourteen hundred sixty-two counts.

Similarly, in *Robinson* v. *United States,* 143 F. (2d) 276 (C. C. A. 10), the Court of Appeals reversed the conviction under the Mann Act upon indictments charging a single act of transportation, a number of women having been transported for immoral purposes at the same time. The court held that the single act of transportation could not be separated into multiple counts for each woman transported, stating at page 277:

> "Merely because one element of a single criminal act embraces two persons or things, a prosecutor may not carve out two offenses by charging the several elements of the single offense in different counts and designating only one of the persons or things in one count and designating only the other person or thing in the other count."

But cf. *Crespo* v. *United States,* 151 F. (2d) 44 (C. C. A. 1). Other cases illustrating the same principle are *Powe* v. *United States,* 11 F. (2d) 598 (C. C. A. 5); *Short* v. *United States,* 91 F. (2d) 614 (C. C. A. 4); *United States* v. *Anderson,* 101 F. (2d) 325 (C. C. A. 7); and *Bertsch* v. *Snook,* 36 F. (2d) 155 (C. C. A. 5).

In connection with this contention of petitioners, it must be noted that petitioners' objection to the indictment was not specified as error in the appeal to the Circuit Court of Appeals, was not argued before the Circuit Court of Appeals and was not considered by the Circuit Court of Appeals until it denied petitioners' supplementary petition for rehearing (R. 993-1011). However, this presents no fatal obstacle to its consideration by this Court on petition for certiorari. In *Carter* v. *United States,* 135 F. (2d) 858, a conviction was reversed on rehearing after original affirmance. The basis for the reversal was not made a ground of

appeal, nor was it assigned for error. However, the court held that the error was "of so fundamental a character as to demand our attention."

The error in the instant case is equally fundamental, and it was, therefore, error on the part of the Circuit Court of Appeals to deny the supplementary petition for rehearing. *Pierce* v. *United States*, 255 U. S. 398. Furthermore, conviction upon counts in an indictment which do not validly charge an offense, are subject to collateral attack on *habeas corpus*. *In re Snow*, 120 U. S. 274. *A fortiori*, therefore, such error on the part of the trial court may be considered on petition for certiorari, even though not originally alleged as error in the appeal to the Circuit Court of Appeals.

II. The Corporation Cannot Be Held Criminally Liable for the Unlawful Acts of Its Representative in the Absence of Knowledge by the Corporation or Benefit to It.

A. *Relation between Gould and the Corporation.*

Petitioner, Dowling Bros. Distilling Company, is a Kentucky corporation, with its principal office in Kentucky (R. 372, 651). Of its 114,200 shares of issued stock, petitioner, Robert Gould, owned 60,000 shares during the period covered by the indictment, while his brother, Alvin Gould, owned 54,180 shares (R. 372-373).

Robert Gould was a director of the corporation, but not an officer (R. 650). He was also an independent whiskey broker and was interested in other distilleries (R. 652-658). His personal offices and his residence were at Cincinnati, Ohio, and not in Kentucky (R. 567, 649). The executive offices of the corporation were in Burgin, Kentucky (R. 650, 760, 843).

Alvin Gould, the other substantial stockholder, was serving in the United States Coast Guard during the entire period covered by the indictment (R. 750-751). The record

does not indicate that he took any part in the transactions charged in the indictment or revealed in the trial.

B. *The Josselson Sales.*

The first twenty-one counts of the indictment charge unlawful sales from Gould and the corporation to Josselson (R. 2-59).

Josselson first met Robert Gould in Cincinnati in 1943, having approached him because he knew Gould was in the whiskey business (R. 202-203). There is no evidence that Josselson knew anything about the Dowling Bros. Distilling Company or that he requested Dowling whiskey. Josselson testified that he made arrangements to buy whiskey from Gould, and that the alleged unlawful payments in excess of the invoice prices, were to be paid to Gould (R. 230). As to each sale alleged in the first twenty counts, Josselson testified that he received a shipment and invoice from the corporation at lawful prices and that he paid the regular ceiling price by check to the corporation (R. 205-242). Josselson then testified that he paid the unlawful excesses in cash to Robert Gould personally in his office at Cincinnati, Ohio, with no one present, save Josselson and Gould (R. 209-242). These alleged payments were made to Gould after Josselson had received shipments and invoices from the corporation (R. 215, 270, 274).[3]

C. *The Baumer Sales.*

Counts 22 through 48 of the indictment charge illegal sales to Baumer, who first met Robert Gould in May, 1943, at Cincinnati, where he had gone to get some whiskey. From Baumer's testimony, the arrangements which he

[3] With respect to the 21st Count, Josselson testified that the excess payment was made in cash to Robert Gould, in Josselson's own office at Ashland, Kentucky (R. 305-306). At this time, Robert Gould was in Ashland visiting his brother who was stationed there in the Coast Guard, but the record shows that no one was present and saw the money transferred except Josselson and Robert Gould (R. 307, 542). There is no evidence that Alvin Gould knew of this payment, or of any alleged payment made to Robert Gould.

made with Gould were substantially the same as those to which Josselson testified (R. 375-413).

D. *The Corporation Received No Benefit from the Acts of Robert Gould and Had No Knowledge of His Unlawful Conduct.*

As previous references to the record demonstrate, no stockholder, director, officer or other representative of the corporation other than Robert Gould had any knowledge of the arrangements between Gould and Josselson or Baumer. None of the illegal payments ever reached the corporation or went further than the hands of Robert Gould, so far as the record indicates. Insofar as Gould entered into illegal arrangements for the sale of Dowling Bros.' product, he was committing a fraud on the corporation. Though Alvin Gould owned almost as much of the stock of Dowling Bros. Distilling Company as did Robert Gould, there is no evidence that he was involved in the transactions, possessed any knowledge of them or received any benefit. Thus, any illegal agreements or transactions in which Robert Gould participated, constituted an unlawful and fraudulent use of the corporation's product and facilities for personal profit to Robert Gould, and fraudulently subjected the corporation to the possibility of detriment and liability.

In affirming the sentences imposed on the corporation by the trial court, the Court of Appeals emphasizes the fact that Robert Gould and his brother, Alvin, owned substantially all the stock in the corporation. However, in the absence of any proof that Alvin Gould participated in the unlawful acts of Robert Gould, or benefited from them, it cannot be assumed that he was in *pari delicto*.

The fraud allegedly committed by Robert Gould against the corporation which he represented, served to insulate the corporation's liability and to save it from the imputa-

tion of knowledge of such conduct by its agent. As Mr. Fletcher states in his Cyclopedia of Corporations, Volume 3, Section 826:

> "One well established exception to the rule that a corporation is charged with knowledge of its officers and agents is where the latter are engaged in committing an independent fraudulent act upon their own account and the facts to be imputed relate to such fraudulent act. Fraud of officers or agents of a corporation practiced against the corporation, although of course known to them, is not imputable to the corporation where the corporation has not accepted the benefit or otherwise ratified the fraud."

Where the agent acts criminally, the inference is much stronger.

Even where the agent is the sole representative for his principal, the principal is not bound by the fraudulent or criminal acts of the agent, which he cannot be presumed to disclose to the principal, since such disclosure would be contrary to the agent's unlawful purpose. *Anderson* v. *General American Life Insurance Co.*, 141 F. (2d) 898, 907-909 (C. C. A. 6).

E. *The Indictment Charged No Offense against the Corporation.*

Section 302 of the Emergency Price Control Act, as amended, 50 U. S. C., War, Appendix, Section 942 (b), defines "price":

> "The term 'price' means a consideration demanded or received in connection with the sale of a commodity."

The indictment does not charge that the corporation demanded any sums whatever, nor does it charge that the illegal sums were actually received by the corporation. Each count in the indictment alleges that the illegal excesses were:

> ". . . paid to Robert Gould and Dowling Bros. Distilling Company by means of payment to Robert Gould."

Further, the indictment charges that Robert Gould:

> ". . . was then and there a principal stockholder and director of said Dowling Bros. Distilling Company."

The indictment thus rests its charges solely on the inference that, by virtue of his position as a stockholder and director, he represented the corporation. Such a charge does not allege sufficient agency or authority to impute to the corporation the acts of Gould, within the meaning of the Emergency Price Control Act.

The view universally taken as to the authority of a single stockholder or director to represent the corporation is well stated in 13 American Jurisprudence, "Corporations," Section 416:

> "Generally speaking, the stockholders have not power aside from that which is delegated to them as agents to represent the corporation or act for it in relation to its ordinary business. Authority to represent the corporation will not be implied merely by reason of the fact that the stockholder in question owns a large majority of the stock and has thereby power to select and control the board of directors."

and in 13 American Jurisprudence, "Corporations," Section 948:

> ". . . a single director of a corporation as such has no power to act in a representative capacity for the corporation; nor has he general authority to make contracts for the corporation, and there is no presumption that a contract purporting to be made by him was authorized by the corporation, even though he owns a majority of the corporate stock."

The presumption which underlay the charges against the corporation in the indictment being invalid, the indictment

was fatally defective so far as Dowling Bros. Distilling Company was concerned.

F. *The Trial Court's Instruction to the Jury with Reference to the Liability of the Corporation Was Erroneous.*

The court in effect instructed the jury that merely because Robert Gould was a stockholder and director of the corporation at the time he engaged in the illegal transactions charged, his acts would be imputed to the corporation. The court made no effort to inform the jury as to the circumstances under which a corporation might not be liable for the fraudulent or criminal act of its representative (R. 910-916, 921-922). Counsel for petitioner objected to the charge, and saved an exception (R. 917).

Thus, the clear import of the charge was to the effect that, since Robert Gould was a principal stockholder and a director of the corporation, the Dowling Bros. Distilling Company was, by virtue of that fact, liable for his acts.

In view of the considerations previously set forth, it is submitted that the trial court's charge to the jury erroneously damnified the corporation. See *Paschen* v. *United States,* 70 F. (2d) 491, 503 (C. C. A. 7); *Nobile* v. *United States,* 284 Fed. 253, 255 (C. C. A. 3); *United States* v. *Food and Grocery Bureau,* 43 Fed. Supp. 966 (S. D., Cal.).

III. The Admission of Testimony Relating to Extraneous Offenses for Which Defendants Had Never Been Conviced or Indicted Constitutes Reversible Error.

Three witnesses, Lee Friedman, Michael Friedman and William R. Gustin, were allowed to testify in rebuttal over the objection of defense counsel (R. 867-889, 892-894, 894-896). They testified with respect to alleged black market transactions not charged in the indictment and for which neither of petitioners had ever been convicted or indicted.

Since *Boyd* v. *United States,* 142 U. S. 450, it has been

unchallengeably established that the introduction of extrinsic testimony relating to specific instances of misconduct on the part of the defendant, when such offenses have not been charged in the indictment, is reversible error. 3 Wigmore on Evidence, §§ 979, 987. *United States* v. *Novick*, 124 F. (2d) 107, 109 (C. C. A. 2), cert. den., 62 Sup. Ct. 795; *Little* v. *United States*, 93 F. (2d) 401 (C. C. A. 8), cert. den., 58 Sup. Ct. 643; *Niederluecke* v. *United States*, 21 F. (2d) 511 (C. C. A. 8); *Lennon* v. *United States*, 20 F. (2d) 490, 494 (C. C. A. 8); *Verro* v. *United States*, 95 F. (2d) 504 (C. C. A. 3); *Weil* v. *United States*, 2 F. (2d) 145 (C. C. A. 5); *Gideon* v. *United States*, 52 F. (2d) 427 (C. C. A. 8); *Sutherland* v. *United States*, 92 F. (2d) 305, 308 (C. C. A. 4); *Simpkins* v. *United States*, 78 F. (2d) 594, 597, 598 (C. C. A. 4); *Miller* v. *Oklahoma*, 149 Fed. 330 (C. C. A. 8).

Sometimes such extrinsic testimony may be admitted for the purpose of proving the defendant's motive, or of proving the existence of a continuing plan or scheme. Since no question of motive was involved in the instant case, and since the indictment charged only specific acts and did not charge a continuing plan or conspiracy, these exceptions are inapplicable. Indeed, their applicability was not asserted by the trial court or the Circuit Court of Appeals.

Rather the Circuit Court of Appeals affirmed the admission of this inadmissible testimony upon the mistaken assumption, stated in the court's opinion (R. 947) that Gould, the defendant, had testified on cross-examination that he never at any time sold whiskey at unlawful prices. Hence, the Circuit Court of Appeals concluded that the testimony in question was admissible on rebuttal to impeach the credibility of Gould's statement.

This assumption on the part of the Circuit Court of Appeals is clearly erroneous, being based on a view of the record originally accepted but later retracted by the trial court (R. 884).

On direct examination, Gould, referring to a list of Dowling Bros. Distilling Company's customers for the year 1943, testified that he had never sold whiskey to any of them at prices over the ceiling (R. 571). Similarly, Gould further testified that he had never sold any whiskey to Josselson at over-ceiling prices (R. 685).

As a result of this testimony, Gould was subjected, on cross-examination, to extended questioning with respect to sales made to the two Friedmans and to Gustin, none of whom were customers of Dowling Bros. during the year 1943 (R. 824-825).

Subsequently, the two Friedmans and Gustin were placed on the stand and their testimony was admitted by the trial court to impeach the credibility of Gould (R. 872-884). However, the trial court examined the record and specifically repudiated the previous erroneous assumption that Gould had testified flatly that he had never sold any whiskey at unlawful prices (R. 884).

Despite this action on the part of the trial court, the Court of Appeals affirmed the admission of the challenged testimony upon the very assumption which the trial court had retracted. Thus, if the admission of this testimony is to be upheld, it must be upon some ground other than that urged by the Court of Appeals.

However, even if Gould had testified on cross-examination in the manner in which the Court of Appeals incorrectly assumed he did testify, the evidence of the two Friedmans and Gustin would be inadmissible and its admission would still constitute reversible error. It is well settled that, though the defendant may be cross-examined regarding specific instances of misconduct extraneous to the offenses charged in the indictment, the prosecution is bound by his answers and may not introduce extrinsic evidence to rebut the testimony thus elicited. As Professor Wigmore states in Volume 3, Section 981 of his treatise on Evidence, page 548:

> ". . . The opponent cannot proceed to prove the alleged fact by extrinsic testimony and that, if he chooses to ask for testimony on this point from the witness himself, he must accept the chances of the jury believing a negative answer."

Under these circumstances, despite anything that the defendant may state on cross-examination, the admission of extrinsic testimony to contradict him is reversible error. *United States* v. *Novick*, 124 F. (2d) 107 (C. C. A. 2); *Little* v. *United States*, 93 F. (2d) 401 (C. C. A. 8).

Likewise, the trial court's basis for admitting the testimony was equally erroneous, since the admission of extrinsic evidence of specific offenses for the purpose of impeaching the reputation and character of the defendant constitutes reversible error. See *Eley* v. *United States*, 117 F. (2d) 526, 528 (C. C. A. 6); *United States* v. *Sager*, 49 F. (2d) 725 (C. C. A. 2); *Smith* v. *United States*, 10 F. (2d) 787 (C. C. A. 9); cases cited in footnote 1 to Section 987 of Wigmore on Evidence.[4]

Therefore, the admission of this testimony cannot be defended either on the theory espoused by the trial court or upon the erroneous assumptions of fact repudiated by the trial court and accepted by the Circuit Court of Appeals. The decision of the court below, therefore, is in conflict with the *Boyd* case and constitutes the affirmance of a radical departure from the accepted and usual course of judicial proceedings.

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[4] The cases cited by the Circuit Court of Appeals in support of its conclusion do not relate to the point in question here. All except one involved either evidence of prior convictions, or evidence elicited directly on cross-examination of the defendant himself. None deal with extrinsic testimony adduced to impeach the character of the defendant except *United States* v. *Rubenstein*, 151 F. (2d) 915 (C. C. A. 2). In that case, over the vigorous dissent of Judge Frank, the conviction was affirmed; however, the testimony in question was introduced for the purpose of proving defendant's fraudulent motive—a matter not here in issue. Furthermore, the Draconian views of the Circuit Court of Appeals for the Second Circuit with respect to matters of criminal procedure, are not unchallenged.

CONCLUSION

It is therefore urged that the petition for writ of certiorari should be granted.

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1102

ROBERT GOULD AND DOWLING BROS. DISTILLING COMPANY, A KENTUCKY CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 936–948) is reported at 153 F. 2d 353.

JURISDICTION

The judgment of the circuit court of appeals was entered February 8, 1946 (R. 935), and petitions for rehearing were denied March 11, 1946 (R. 1011).[1] The petition for a writ of certiorari

[1] The petitions for rehearing were apparently denied before the judges who heard the appeal received a supplemental petition (see R. 1011). On April 13, 1946, after the petition for a writ of certiorari had been filed in this Court, the circuit court of appeals denied the supplemental petition. We are informed by counsel for petitioners that a copy of this order has been sent to the Court.

was filed April 12, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.[2]

QUESTIONS PRESENTED

1. Whether the counts of an indictment charging sales and deliveries of liquor at above ceiling prices, each based on a separate invoice from buyer to seller, charged separate offenses.

2. Whether the petitioner corporation was properly found to be criminally liable for sales effected by its principal stockholder who was in active control of the corporation and in complete charge of sales.

3. Whether evidence of sales to persons not charged in the indictment in a manner similar to that proved as to those charged in the indictment was properly admitted in rebuttal as bearing on the credibility of petitioner Robert Gould after he had denied making such sales.

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[2] The petition was filed within 30 days, exclusive of Sundays and holidays, from the date of the order of the circuit court of appeals denying rehearing, as allowed by Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934, but more than 30 calendar days after the order, as allowed by Rules 37 (b) (2) and 45 (a) of the new Rules of Criminal Procedure, effective March 21, 1946. Since the petition seeks review of a judgment entered prior to the effective date of the new rules, we do not contest its timeliness. See Rule 59 of the Rules of Criminal Procedure, providing that, "so far as just and practicable," the rules govern all criminal proceedings which were pending on their effective date.

STATUTE INVOLVED

The Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. App., Supp. IV, 901 *et seq.*, provides in pertinent part:

> SEC. 2. (a) Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. * * *
>
> SEC. 4. (a) It shall be unlawful * * * for any person to sell or deliver any commodity, * * * in violation of any regulation or order under section 2 * * *.
>
> SEC. 205. * * * (b) Any person who willfully violates any provision of section 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. * * *.

STATEMENT

An indictment in 48 counts was returned against petitioners in the United States District Court for the Eastern District of Kentucky, each count charging the sale and delivery of a specified

quantity of liquor on a specified date between June 26 and December 2, 1943, at prices in excess of the maxima fixed by O. P. A. regulations (R. 2–137). Counts 1 to 21, inclusive, were based on sales to Josselson Bros. Inc. (R. 2–59), and counts 22 to 48 on sales to E. J. Baumer, doing business as B. & B. Liquor Wholesalers (R. 59–137).

Alex Josselson and E. J. Baumer were witnesses for the Government (R. 202, 374). Each of them testified that petitioner Robert Gould agreed to sell him liquor at fixed prices above ceiling, the amount of the excess charge varying according to the grade and quantity of the liquor (R. 202–205, 208, 269, 376–378). As each of these witnesses was on the stand, the invoice upon which each count of the indictment was based was introduced in evidence, and the witness testified that he had received the liquor covered by the invoice, had paid the invoice (ceiling) price by check to the Dowling Company, and had paid an additional specified amount in cash to Robert Gould personally (R. 208–244, 379–399). In all, Josselson paid approximately $280,000 above ceiling and Baumer over $200,000.[3]

[3] Baumer was directly corroborated by one of his salesmen, who testified that on some occasions he delivered cash to Robert Gould (R. 509, 511–512). Josselson was corroborated to the extent that his bookkeeper testified that Josselson directed him to keep packages of currency in the safety deposit vault and to take out the money before Josselson's trips to Cincinnati (cf. R. 248 with R. 326–327, 343), where peti-

Robert Gould was chairman of the board of directors and majority stockholder of the Dowling Company (R. 372, 649–650). The only other substantial stockholder was his brother Alvin (R. 372–373, 653), whom Robert characterized as a partner (R. 569), and who, during the period covered by the indictment, was on active duty in the United States Coast Guard (R. 761). With Alvin Gould's knowledge and consent, Robert Gould was directing head of the company (R. 761–762). Robert was in complete charge of sales (R. 354, 651).

In submitting the case to the jury, the judge charged that "the corporation here can be guilty only if you believe that there were violations of these maximum ceiling prices by its officers and agents and stockholders with the consent of the corporation. A corporation can only give its consent through its stockholders, officers and agents" (R. 912). He then stated that there was no dispute that Robert and Alvin Gould owned all but 20 shares of the stock of the corporation, and further charged the jury that "if you believe that this corporation, acting through its agents, managing agents, officers and stockholders, with their consent, violated this law as charged in this in-

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tioner Gould maintained his office (R. 352, 649–651). Baumer also testified that he paid Gould with bills of large denominations (R. 378) and there was testimony by various bank tellers that on a number of occasions Gould exchanged large bills for smaller ones (R. 529–530, 533–534, 536–537).

dictment, and if you believe that as I shall instruct you beyond a reasonable doubt, then, the corporation is liable" (R. 912).

The jury returned a verdict of guilty on all counts against both Robert Gould and the corporation (R. 924). Gould was sentenced to imprisonment for a total of six years, one year on each count of the indictment, the first six sentences to run consecutively and the others to run concurrently with the first six and with each other. He was also fined $5,000 on each count, making a total fine of $240,000. The corporation was also fined $240,000, $5,000 on each count. (R. 925.) On appeal, the judgments were affirmed (R. 935).

ARGUMENT

Petitioners contend (Pet. 2, 3, 6, 9, 10–15) that a number of counts of the indictment are based on the same transaction and do not charge separate offenses. The point was first raised by a supplement to the petitions for rehearing filed in the circuit court of appeals on March 7, 1946 (R. 995–1008), more than a week after the original petitions for rehearing had been filed (R. 951–992). The circuit court of appeals denied the petitions for rehearing on March 11, 1942 (R. 1011), apparently before the supplement to the petitions had been received by the judges who heard the appeal (see R. 1011). On April 13, 1946, after the petition for a writ of certiorari

had been filed in this Court, the circuit court of appeals entered a *per curiam* order denying the supplement to the petition, in which it pointed out that even if petitioners' contention in this respect were sound, there would nevertheless be a sufficient number of valid counts to support the term of imprisonment imposed against Robert Gould. It declined to express any view on the belated challenge to the validity of the fines, stating that a defendant may move in the convicting court for correction of an invalid sentence.

We assume that, as petitioners argue (Pet. 14–15), the question is one which may be raised at this point, despite the tardiness of the objection below. The contention is, however, clearly without substance. Each count of the indictment was based on a separate invoice from the Dowling company to the purchaser, and when a particular invoice included different quantities and brands of liquor the transaction was nevertheless charged as one offense (see count 4, R. 10–12; count 5, R. 12–15; count 6, R. 15–18; count 10, R. 26–29; count 36, R. 99–102). All the invoices except those forming the basis of the first two counts bear different dates, showing clearly that they represented separate deliveries of liquor. Since delivery is itself an offense under the Emergency Price Control Act (see Section 4 (a), *supra*, p. 3; *Schreffler* v. *Bowles*, 153 F. 2d 1 (C. C. A. 10)), counts 3 to 48, inclusive, on their face charge separate offenses which were established as such by

the evidence consisting of the separate invoices. Petitioners' contention that certain groups of these counts are based on single transactions is predicated upon the fact that such counts specify that the respective agreements to sell were made on the same date (Pet. 11–12). However, each count specified the date of the invoice as the date of the offense charged therein. Nor does the fact that the purchaser paid for two separate invoices by one check (R. 386–390) establish, as petitioners claim (Pet. 12), that such invoices represent one transaction.

The separate invoices upon which counts 1 and 2 were based bear the same date, but one was for whiskey and the other for rum (R. 2–7). Even as to these counts, the indications are that the invoices represented separate shipments since, in another instance, rum and whiskey were covered by one invoice (count 4, R. 10–12). In any event, rum and whiskey are two separate items subject to two different ceiling prices which had to be separately calculated (see R. 456). Hence, even assuming that delivery was made at the same time under both invoices, we think it is clear that the sale of each of these separate articles constitutes a separate offense.

2. On behalf of the corporation it is contended (Pet. 2, 7, 15–20) that the indictment does not allege, and the evidence does not establish, facts upon which to predicate corporate responsibility.

The indictment alleged in each count that the corporation and Robert Gould, who was "a principal stockholder and director," unlawfully sold and delivered and aided and abetted each other in so selling and delivering liquor at above ceiling prices. Manifestly, therefore, the indictment directly alleged illegal corporate action.

The proof established that the only substantial stockholders of the corporation were Robert Gould and his brother Alvin, and that Robert, with Alvin's knowledge and consent, was in active control of the corporation and in complete charge of sales during Alvin's absence on military duty (see *supra,* p. 5). Dowling, the president of the corporation, testified that he was in charge of the distilling process and had no authority to make sales (R. 349–354). The only person who could act for the corporation in making the sales in question was, therefore, Robert Gould. The liquor sold was owned by the corporation and the sales were invoiced in its name. Since it is well established that a corporation is criminally responsible for the acts of its agent committed in the scope of the agent's authority,[4] we think it is clear that the corporation was properly held liable for the sale of corporate owned liquor sold by

[4] *New York Central Railroad* v. *United States*, 212 U. S. 481; *C. I. T. Corporation* v. *United States*, 150 F. 2d 85, 89–90 (C. C. A. 9); *Egan* v. *United States*, 137 F. 2d 369, 379 (C. C. A. 8), certiorari denied, 320 U. S. 788; *Mininsohn* v. *United States*, 101 F. 2d 477–478 (C. C. A. 3).

the only agent of the corporation who could make sales.

In instructing the jury as to corporate responsibility, the judge laid down a stricter test than that set forth in the cases cited (*supra,* fn. 4); he charged that there must have been consent by the corporation (*supra,* p. 5). He then summarized the undisputed facts from which such consent might be found. Since the charge in this respect was more favorable to the petitioning corporation than was required, the objection to the charge (Pet. 20) is without merit.

Under the facts of this case, Robert Gould, who made the sales, was also the person who, with the knowledge and consent of all stockholders, was in active control of the corporation as a whole. In practical effect, he was the only person who was in a position to give consent on behalf of the corporation. The jury was thus justified in finding the corporation liable under the judge's charge on the basis of its consent to the acts in question. There is no proof that payment to Gould, the responsible officer of the corporation, was not payment to the corporation. But, in any event, benefit is not the "touchstone of corporate criminal liability; benefit, at best, is an evidential, not an operative, fact." *Old Monastery Company* v. *United States,* 147 F. 2d 905, 908 (C. C. A. 4), certiorari denied, October 8, 1945, No. 229 this Term.

3. When Robert Gould took the stand in his own behalf, he testified that the Dowling company had made sales to Josselson and Baumer at the invoice prices and that he had not received, directly or indirectly, any payments above those prices (R. 612). On cross-examination, he was asked whether he had not, during the period covered by the indictment, received cash premiums above ceiling prices from persons not named in the indictment, and he denied receiving such payments (R. 661–667, 676–677). Petitioners' objections to this line of cross-examination were overruled (R. 664, 665, 676, 677). In rebuttal, the Government called as witnesses the persons about whom Gould had been questioned and, over objections by defense counsel (R. 868–885), these witnesses were allowed to testify that they had made cash payments in excess of ceiling prices to Gould (R. 885–886, 889–891, 892–893, 894–895).[5] In each instance the judge instructed the jury that the evidence should be considered, if at all, only as bearing on the credibility of Robert Gould (R. 888, 891, 893, 895–896).

Petitioners argue (Pet. 3, 7, 20, 23) that the admission of this evidence in rebuttal constituted reversible error on the ground that it was offered

[5] During the course of the discussion of petitioners' objections, it appeared that the trial judge first thought that Gould had testified on direct that he had never made any sales above ceiling (R. 872), but before the judge made his final ruling, he admitted that Gould had not made such a general statement (R. 884).

in contradiction of a collateral issue. However, as petitioners' counsel himself admitted during the course of the argument on the admissibility of such testimony (R. 869, 873, 879, 881), the evidence could properly have been offered in the Government's case in chief as bearing on the willfulness of petitioners' conduct and the scheme by which they operated. *Morris* v. *United States*, 123 F. 2d 957 (C. C. A. 5); *United Cigar Whelan Stores Corporation* v. *United States*, 113 F. 2d 340, 347 (C. C. A. 9); see *Glasser* v. *United States*, 315 U. S. 60, 81. The evidence was therefore not collateral as that term is used in defining the limits by which a cross-examiner is bound by the negative answers given by a witness. The rule is that facts which could have been independently offered for another purpose may be offered in contradiction of a witness. 3 Wigmore, *Evidence*, 3d ed., sec. 1003. It was, therefore, proper for the Government to cross-examine Gould as to these matters, both on the issue of his intent, and as affecting his credibility,[6] and to offer evidence to rebut his negative answers. *Strom* v. *United States*, 12 F. 2d 233, 234 (C. C. A. 6), certiorari denied, 271 U. S. 683; see *Ewing* v. *United States*, 135 F. 2d 633, 640–641 (App. D. C.), certiorari denied, 318 U. S. 776.

[6] *Powers* v. *United States*, 223 U. S. 303, 315, 316; *United States* v. *Skidmore*, 123 F. 2d 604 (C. C. A. 7), certiorari denied, 315 U. S. 800; *United States* v. *Harrison*, 121 F. 2d 930, 934 (C. C. A. 3), certiorari denied, 314 U. S. 661.

In essence, petitioners' contention amounts to no more than that evidence which could have been admitted in chief was allowed in rebuttal. It is well established that this does not constitute grounds for reversal. *Goldsby* v. *United States,* 160 U. S. 70, 74; *United States* v. *Montgomery,* 126 F. 2d 151 (C. C. A. 3), certiorari denied, 316 U. S. 681; *Cornes* v. *United States,* 119 F. 2d 127, 130 (C. C. A. 9); *Hoffman* v. *United States,* 68 F. 2d 101, 103 (C. C. A. 10). Petitioners in particular have no cause for complaint, since the evidence as finally admitted was given more limited application than it would have had if offered in chief.

CONCLUSION

The decision below is correct and the case presents no conflict of decisions or question of general importance. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 1102

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

ROBERT GOULD and DOWLING BROS. DISTILLING COMPANY, a Kentucky corporation,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

The Government's brief over-simplifies the questions presented, thereby in effect implying a situation different from that disclosed by the record.

I. EACH INVOICE DOES NOT CONSTITUTE A SEPARATE "DELIVERY" WITHIN THE MEANING OF THE EMERGENCY PRICE CONTROL ACT

Each count of the indictment was based upon a separate invoice, but each invoice was not based upon a separate

sale, since the liquor involved in a single sale was usually invoiced to the purchaser in separate installments.

Respondent, however, argues that each invoice reflects a separate delivery, and that each delivery constitutes a separate offense under the Emergency Price Control Act. This contention ignores the fact that a single delivery may be made by installments, just as a single sale may be invoiced in separate installments.

The Emergency Price Control Act in Section 4(a) makes it unlawful:

> "for any person to sell or deliver any commodity . . . in violation of any regulation or order under section 2. . . ."

The purpose of this provision is to penalize either the sale of a commodity, or the delivery of a commodity after sale. Its purpose is not to multiply the offenses covered in a single sale simply because the delivery was made in installments. Following each sale which was made, the commodity was delivered in installments, each of which was invoiced separately. The total installments thus invoiced constitute a single delivery of the subject matter of the single sale. Otherwise, respondent might logically contend that there had been separate delivery not only for each invoice but for each case, package or bottle.

Shreffler v. *Bowles,* 153 Fed. (2d) 1, (C. C. A. 10), cited on Page 7 of the respondent's brief, holds that the statute of limitations does not bar an action under the Emergency Price Control Act where delivery of the article was made within one year before the commencement of the action, even though the actual sale was made more than one year before. Thus, the case has no bearing on the issue here presented.

II. THE CORPORATION CANNOT BE HELD LIABLE FOR THE ALLEGED CRIMINAL ACTS OF GOULD FROM WHICH THE CORPORATION DERIVED NO BENEFIT AND OF WHICH NO OTHER STOCKHOLDER, OFFICER OR AGENT HAD KNOWLEDGE

Respondent emphasizes the fact that petitioner's brother, Alvin Gould, was the only other substantial stockholder in the corporation. However, it must be pointed out once more that, during the period covered by the indictment, Alvin Gould was on active duty with the United States Coast Guard; that he was not indicted; and that there was no evidence from which it may be inferred that he knew anything of the acts charged against petitioner, Robert Gould. Certainly incriminating knowledge cannot be imputed to Alvin Gould from the bare fact that he was Robert Gould's brother, nor from the bare fact of his stock in the corporation, nor from his consent that Robert Gould act as directing head of the corporation while he was in the Service.

Petitioner earnestly submits that the trial court's charge to the jury (R. 911-912) would lead a jury of laymen irresistibly to conclude that the corporation was liable for the alleged illegal acts of Robert Gould solely because of his position as managing agent and stockholder therein. Furthermore, the trial court's undue emphasis on the fact that Alvin Gould, the other stockholder, was a brother of Robert Gould, would reinforce such a conclusion in the minds of the jury. This is especially true in the absence of any explanation by the trial court of circumstances under which a corporation might be responsible for the fraudulent or criminal acts of its representative.

Cases cited by the respondent in the footnote on Page 9 of its brief are irrelevant to this issue, since in each of

them the alleged illegal acts were performed to the profit and for the benefit of the corporation, whereas in the case at bar there is no evidence that any of the alleged illegal excesses paid to Robert Gould were passed on to the corporation.

Likewise, *Old Monastery Co.* v. *United States,* 147 Fed. (2d) 905 (C. C. A. 4), is far afield. That case dealt with acts committed by the president of the corporation, who purported to act as its representative and who issued its checks. As the Court said, 147 Fed. (2d) 905, 908:

> "There was other evidence tending to prove, and altogether consistent with the idea, that Ostrow, both in the negotiations and also in the carrying out of this contract for the sale of whiskey, acted, not as an individual, but in the role of president and representative of Monastery within the scope of his corporate capacity both actual and apparent."

In the case at bar, there is no evidence that, insofar as the illegal acts charged are concerned, Robert Gould purported to act on behalf of the corporation, or that the corporation benefited therefrom. While the corporation's offices were located at Burgin, Kentucky, the alleged illegal transactions occurred in Robert Gould's office at Cincinnati, Ohio. Robert Gould was a whiskey broker, and in this capacity rather than as a representative of the corporation, he was approached by the purchasers named in the indictment.

III. EVIDENCE OF ILLEGAL ACTS NOT CHARGED IN THE INDICTMENT AND FOR WHICH THERE HAS BEEN NEITHER ARREST NOR CONVICTION, MAY NOT BE INTRODUCED TO IMPEACH DEFENDANT'S CREDIBILITY

The indictment does not charge a conspiracy, a continuing activity or any offense in which continuing design,

motive or intent is a necessary element. So far as this indictment was concerned, the petitioner either made illegal sales or he did not make them. If he made them, then his act was wilful within the meaning of the statute. No issue of motive, intent or design was presented. Cross-examination of petitioner as to these extraneous acts was permitted by the trial judge on the admittedly mistaken assumption that the petitioner had testified flatly that he had never sold liquor at over ceiling prices. While the trial court later acknowledged its mistake, witnesses were nevertheless permitted to testify in rebuttal with respect to these extraneous acts.

No such theory as that now espoused by the respondent was adduced in the trial court; and, indeed, such a theory would have been wholly erroneous.

Proof of this contention is contained in the various cases cited on Pages 12 and 13 of respondent's brief.

In *Morris* v. *United States,* 123 Fed. (2d) 957 (C. C. A. 5), the issue was whether the defendant knew that a purchaser had bought paregoric for a drug rather than for a medicine. In *United Cigar Whelan Stores* v. *United States,* 113 Fed. (2d) 340 (C. C. A. 9), the issue was whether the defendant had, by selling denatured alcohol with knowledge that it was to be drunk, carried on a retail liquor business without payment of tax. Other cases cited by the Government all relate either to situations in which conspiracy was charged, or in which there was a continuing plan or scheme, or in which the defendant's intent was a necessary element in the offense, or in which the matters adduced on cross-examination or in rebuttal were, as the trial court here originally thought to be the case, opened up voluntarily by the defendant on direct examination.

In connection with this point, in two of the cases cited in the respondent's brief *U. S.* v. *Skidmore,* 123 Fed. (2d)

604 (C. C. A. 7), and *U. S.* v. *Montgomery*, 126 Fed. (2d) 151 (C. C. A. 3), cert. den. 316 U. S. 681, the following rule is stated (in the *Skidmore* case):

> "It (evidence of prior arrest) not only exceeded the limits of cross-examination and was purely collateral, but, if admitted, the answer would not have affected his character, *because a mere arrest furnishes no presumption whatever of guilt.*"[1]

and (in the *Montgomery* case):

> "We believe the rule with respect to impeachment for former conviction, as generally applied by federal courts in criminal cases, to be that *it is only conviction for felony or misdemeanor amounting to crimen falsi which are admissible to impeach a witness' credibility.*"

3 Wigmore, Evidence, 3rd Edition, Section 1005(a) says:

> "Particular acts of misconduct are not provable by extrinsic evidence to impeach moral character; they are also not provable merely in contradiction of the witness' statements on the stand; *except a judgment of conviction of crime, etc.*"

It was not, therefore, as respondent concludes on Page 12 of its brief, "proper for the Government to cross-examine Gould as to these matters." Instead, it was reversible error so to do, since he had never been convicted or even indicted for such matters.

Respondent's brief completely fails to support the proposition that evidence of collateral acts for which there has been no arrest or conviction, may be admitted against a defendant indicted for specific acts provable by direct evidence.

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[1] Emphasis supplied throughout is ours unless otherwise indicated.

CONCLUSION

The petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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